

No. 91-589

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IN THE
Supreme Court of the United States
October Term, 1991

GAF CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF IN SUPPORT OF
GAF CORPORATION'S PETITION
FOR A WRIT OF CERTIORARI

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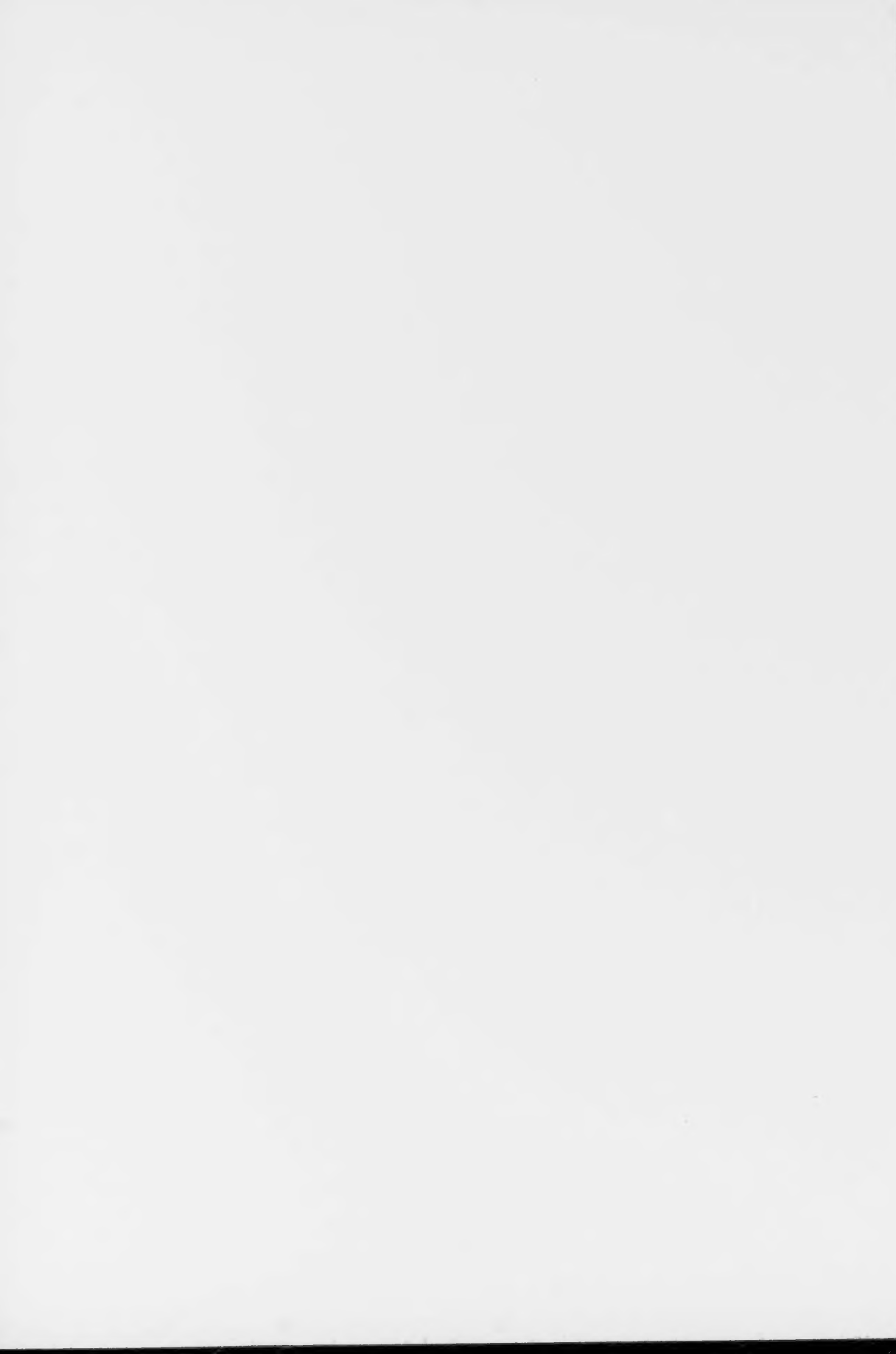


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LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioner GAF Corporation and the respondent the United States.

Petitioner GAF Corporation has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

TABLE OF AUTHORITIES

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GAF Corporation ("GAF") submits the following reply to the Government's arguments:

1. The Government contends that the Court of Appeals for the Federal Circuit, "in an area of law that Congress has committed to its oversight," decided "not to hold that the government has a duty of inquiry to ascertain what an experienced vendor knows about the hazards of its own products." (Gov't Br.

at 7.)^{1/} But this case has nothing to do with any Government "duty of inquiry."

The record shows without contradiction that the Government *knew* that Ruberoid's experience as an asbestos manufacturer would not have made it aware that its products were hazardous to workers using them. The Government admitted as much in the Fleischer-Drinker Report.^{2/}

The Federal Circuit majority, however, disregarded this admission and ruled that the Government simply cannot have reason to know that an "experienced producer" is unaware that its products are hazardous.^{3/} As a result, the Federal Circuit established a rule of government contract law that arbitrarily relieves the Government of any duty to disclose its superior knowledge of product hazards to an "experienced producer," even where, as here, the Government acknowledges that the producer's experience would not have disclosed the hazards.

As Judge Newman's dissent from the Federal Circuit's decision demonstrates, the Fleischer-Drinker Report, the Government's concealment of classified studies demonstrating the hazard of asbestos insulation products to shipyard workers, and the uncontradicted evidence that even the scientific community was unaware of the hazard to shipyard workers until the mid-1960's are compelling evidence that the Government knew that Ruberoid

^{1/} "Gov't Br. at __" citations are to the *printed* version of the Government's Brief in Opposition, not the typewritten version that the Government filed originally.

^{2/} See GAF Pet. at 5; 932 F.2d at 952 (Newman, J., dissenting) (GAF Pet. at 10a-11a). "GAF Pet. at __a" citations are to the appendix to GAF's Petition for a Writ of Certiorari.

^{3/} See 932 F.2d at 949 (GAF Pet. at 4a-5a).

was unaware of the hazard to shipyard workers at the time it contracted with the Government.^{4f}

Nevertheless, the Claims Court ruled that this evidence was “not material,” and relegated it to a footnote.^{5f} The Federal Circuit simply ignored it.^{6f} The Government never mentions it. Instead, the courts below and the Government rely entirely on Ruberoid’s experience as a producer to negate the Government’s duty to disclose.^{7f}

The dispute in this case, therefore, is not merely whether “a thorough examination of the extensive factual record” justifies the lower courts’ conclusion that there is no genuine issue of material fact. (Gov’t Br. at I, 7.) The courts below applied, and the Government seeks to defend, a *rule* that if a Government contractor is an “experienced producer,” no other evidence will be considered.

In applying this rule, the courts below did not apply “settled legal doctrine to the facts of this case.” (Gov’t Br. at 7.) On the contrary, this rule is as unprecedented as it is perverse. As the Federal Circuit acknowledged previously, a contractor, complaining of a breach of the duty to disclose superior knowledge, is entitled to “produce specific information to back up

^{4f} See 932 F.2d at 952 (Newman, J., dissenting) (GAF Pet. at 10a-11a); GAF Pet. at 4-6.

^{5f} 19 Cl. Ct. at 498 n.2 (GAF Pet. at 32a).

^{6f} 932 F.2d at 949 (GAF Pet. at 4a-5a).

^{7f} 19 Cl. Ct. at 502 (GAF Pet. at 42a); 932 F.2d at 949 (GAF Pet. at 4a-5a); Gov’t Br. at 6, 7.

his contention."⁸ GAF produced precisely such evidence, but the courts below fashioned a novel rule of government contract law that permitted them to ignore it.

2. The Government also contends that the superior knowledge doctrine has never been applied to claims "for reimbursement for a contractor's tort liability, which (as in this case) is typically incurred long after completion of the contract." (Gov't Br. at 8.) The Government, however, does not explain why the doctrine should not apply to costs resulting from tort claims, or why it should matter that, because of the latent nature of the undisclosed product hazard, the costs are not incurred until after completion of the contract.

The cost of tort suits is a cost like any other cost of performing a contract. If anything, the superior knowledge doctrine makes even more sense where the Government conceals latent product hazards that expose a contractor to the costs of subsequent tort claims. If the Government is required to disclose problems such as adverse weather conditions⁹ or labor shortages¹⁰ that affect merely the cost of completing a contract, surely the Government should be required to disclose hazards that not only expose the contractor to the massive costs of subsequent tort claims, but that also expose thousands of workers to disease and death.

⁸ *Lopez v. A.C. & S., Inc.*, 858 F.2d 712, 717 (Fed. Cir. 1988), *cert. denied*, 491 U.S. 904 (1989). As Judge Newman's dissent demonstrates, although *Lopez* rejected a superior knowledge claim brought by asbestos manufacturers, the factual record here is "significantly different" from the record in *Lopez*. 932 F.2d at 951-53 (Newman, J., dissenting) (GAF Pet. at 8a-13a).

⁹ See *Hardeman-Monier-Hutcherson v. United States*, 198 Ct. Cl. 472, 458 F.2d 1364 (1972).

¹⁰ See *J.A. Jones Construction Co. v. United States*, 182 Ct. Cl. 615, 390 F.2d 886 (1968).

3. The Government also contends that it should be excused from its duty to disclose superior knowledge because Ruberoid was not an "innocent bystander." (Gov't Br. at 9). The Government asserts that GAF "would not have been held liable . . . unless it knew of the dangers of exposure to its products and failed to warn of them." (Gov't Br. at 9.) This assertion is seriously misleading. The evidence is uncontradicted that Ruberoid did not know of the dangers that its products posed to shipyard workers until the mid-1960's, and neither did the scientific community.^{11/}

As the Government knows, the fact that juries in some cases found GAF liable for failure to warn does not justify a conclusion that Ruberoid knew of the dangers of its insulation products or even that such knowledge could have been obtained from available sources. Under the strict failure-to-warn standard of Section 402A of the Restatement^{12/} as applied in cases like *Borel v. Fibreboard Paper Products Corp.*,^{13/} these juries were permitted to find GAF liable for failing to go *beyond* available knowledge and for not conducting its own scientific research to discover the hazard.

The issue, therefore, is whether the Government should be absolved of liability for failing to disclose hazards to a contractor, simply because, years later, a jury might find the contractor liable for not conducting tests to find out what the Government already knew. Surely the better rule is that the Government should reveal what it knows.

^{11/} 932 F.2d at 951-52 (Newman, J., dissenting) (GAF Pet. at 8a-10a); GAF Pet. at 4-5.

^{12/} *Restatement (Second) of Torts* § 402A, comment j (1964).

^{13/} 493 F.2d 1076, 1089-90 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974).

The Government's argument is also misleading, because, as the Government knows, GAF, in large part, is seeking reimbursement of costs incurred in cases that ended in settlement, with no finding of liability,^{14/} and the cost of defending cases in which GAF prevailed.^{15/} GAF would not have been exposed to such costs, and to the vagaries of jury determinations,^{16/} had it not been for the Government's failure to disclose its superior knowledge.

Similarly, there is no basis for the Government's suggestion that if Tuberoide had been unaware of the dangers to shipyard workers, it "would have been protected from liability by the government contractor defense." (Gov't Br. at 9-10.) GAF incurred most of the costs and liabilities for which it seeks reimbursement in cases resolved before *Boyle v. United Technologies Corp.*,^{17/} when the unanimous view of federal courts of appeals was that the government contractor defense was limited to cases involving military personnel.^{18/} Moreover, even

^{14/} See GAF Complaint ¶ 2 (App. at 34); O'Brien Aff. ¶ 7 (App. at 445). "App." citations are to the Joint Appendix, dated October 11, 1990, filed with the Federal Circuit in the appeal of this case.

^{15/} E.g., *Sutcliffe v. GAF Corp.*, No. 4015(3) (C.P. Philadelphia County, Feb. 19, 1987); *Cianfrani v. Johns-Manville Corp.*, 482 A.2d 1049 (Pa. Super. 1984).

^{16/} The inconsistency of verdicts in this area is such that courts have refused to give collateral estoppel effect to jury determinations of liability. See, e.g., *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334, 346 (5th Cir. 1982).

^{17/} 487 U.S. 500 (1988).

^{18/} See *Tozer v. LTV Corp.*, 792 F.2d 403, 408 (4th Cir. 1986), cert. denied, 487 U.S. 1233 (1988); *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 738 (11th Cir. 1985), cert. denied, 487 U.S. 1233 (1988);
(continued...)

after *Boyle*, courts have held that the government contractor defense is unavailable in failure-to-warn cases unless government specifications preclude a warning.^{19/}

Hence, the availability or non-availability of a government contractor defense has nothing to do with whether Ruberoid had knowledge of the dangers to shipyard workers. The uncontradicted evidence here shows that Ruberoid did not have such knowledge.

4. The Government contends that GAF's superior knowledge claim is "indistinguishable" from a "reverse warranty" claim. (Gov't Br. at 10.) The Government is wrong. GAF does not contend here that the Government is liable because it negligently used products supplied by Ruberoid. No matter what the Government did with Ruberoid's products *after* receiving them, the Government knew *before* it contracted with Ruberoid that the products were hazardous to shipyard workers. GAF's superior knowledge claim is based on the Government's concealment of this pre-existing knowledge, not on the Government's subsequent conduct.

Similarly, the Government contends that GAF's superior knowledge claim is an attempt "to avoid the limitations on tort recovery from the United States that Congress has established." (Gov't Br. at 10-11 n.4.) GAF does not seek in this case to impose tort standards on the Government. We are asserting simply

^{18/}(...continued)

Bynum v. FMC Corp., 770 F.2d 556, 574 (5th Cir. 1985); *In re Air Crash Disaster at Mannheim Germany on Sept. 11, 1982*, 769 F.2d 115, 122 (3d Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986); *Tillett v. J.I. Case Co.*, 756 F.2d 591, 598 (7th Cir. 1985); *McKay v. Rockwell Int'l Corp.*, 704 F.2d 444, 451 (9th Cir. 1983), *cert. denied*, 464 U.S. 1043 (1984).

^{19/} See, e.g., *Dorse v. Eagle-Picher Industries, Inc.*, 898 F.2d 1487 (11th Cir. 1990); *In re Joint Eastern and Southern District New York Asbestos Litigation*, 897 F.2d 626 (2d Cir. 1990).

that the Government has a duty to deal fairly and candidly with its contractors, an obligation well-recognized in government contract law.^{20/}

5. In the end, the Government seeks to shield the decision below from scrutiny by proposing a rule of deference to the Federal Circuit that would make that court's pronouncements on government contract law virtually unreviewable. (Gov't Br. at 11-12.) This Court, however, has not hesitated to review government contract law decisions that, like this case, raise important questions of national policy. See, e.g., *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961) (reversing judgment of Court of Claims granting contractor's claim against the Government); *United States v. Wunderlich*, 342 U.S. 98 (1951) (reversing judgment of Court of Claims regarding interpretation of "finality clause" of standard form government contract).

The Federal Circuit's decision in this case establishes a rule of government contract law that is irrational. Moreover, the rule conflicts with the policy of fair dealing with government contractors implicit in the Tucker Act, jeopardizes public health and safety, and unfairly relieves the Government of responsibility for the asbestos crisis. Such a rule warrants review by this Court, not deference.

^{20/} See, e.g., *Helene Curtis Industries, Inc. v. United States*, 160 Ct. Cl. 437, 312 F.2d 774 (1963).

CONCLUSION

For the reasons stated above and in GAF's petition, the Court should grant certiorari.

Respectfully submitted,

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